TM FEROZE KHAN & ORS A

v.

MEERA HUSSAIN TM MOHAMED MYDIN

COURT OF APPEAL, PULAU PINANG B
ABDUL KADIR SULAIMAN JCA
RICHARD MALANJUM JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: P-02-39-03]
30 JUNE 2006 C

ISLAMIC LAW: *Gift - Landed property - Gift to minor son - Gift effected by way of transfer and trust deed - Whether there was delivery of possession - Whether there was bona fide intention to give - Conditions and prerequisites for gift - Whether satisfied* D

TRUSTS: *Trust deed - Validity - Trust deed by Muslim donor - Applicable law - Whether that of Islamic law - Whether the civil law*

TRUSTS: *Trust deed - Donor transferring land to himself and holding it in trust of minor son - Whether valid – Whether there was delivery of possession - Vesting order obtained by donee - Whether trust perfected - Transfer of land duly registered - Whether title thereof indefeasible - National Land Code s. 340(1), (2)* E

The deceased owned a piece of land on which were erected nine houses that were rented out to tenants ('the property'). In 1968, the deceased transferred and registered the property to himself as trustee for the benefit of his eight-year old son, the respondent. Simultaneously with that, the deceased also executed a trust deed declaring himself as holding the property in trust for the latter. The deceased did not during his lifetime make any attempt to revoke the memorandum of transfer or trust deed in question. The facts also showed that after the deceased's death in 1991, the respondent, in 1992, obtained an *ex parte* vesting order from the High Court vesting the property in his own name. The facts notwithstanding, the appellants, the deceased's children from his other marriage, argued that the purported gift of the property was void under Islamic law and ought to belong to the deceased's estate. According to the appellants, no valid gift could have been effected since the property, having been rented out, was not in the (physical) possession of the deceased, and neither was such possession handed to the respondent during his lifetime. The

A arguments however were rejected by the High Court judge ruling that there was a valid transfer of the gift of the property to the respondent. Hence, the appellants' appeal herein.

Held (dismissing the appeal)

B **Per Nik Hashim JCA delivering the judgment of the court):**

(1) Under Islamic law, a man may lawfully make a gift of his property during his lifetime if the following conditions are fulfilled, namely: (i) a manifestation of the wish of the donor to give; (ii) the acceptance of the donee, either impliedly or C expressly; and (iii) the taking of possession of the subject matter of the gift by the donee, either actually or constructively. However, in respect of delivery of possession, there is an exception to the general rule if the gift is from a father to his minor son. The law will be satisfied even without D a change in possession if there is a *bona fide* intention to give. (paras 11 & 13)

(2) The deceased had only legal possession and hence could not give physical possession to the respondent. However, the E collection of rental by him was equivalent to possession of the property by him on behalf of the respondent beneficiary. Further, by effecting a legal transfer of the property in favour of the trustee on trust for the respondent, the deceased had transferred legal possession of the property to the respondent. F Thus, the deceased's *bona fide* intention to give the property as a gift to the respondent was clear and unequivocal. The *bona fide* intention aside, the respondent also had perfected the gift by vesting the property in his name. (paras 15 & 16)

G **(3)** All the three conditions for a valid gift under the Islamic law had been fully satisfied. The gift was therefore validly made under the Islamic law and the learned judge was right in dismissing the appellants' claim. In any case, since the creation of the trust and the transfer in 1968, the respondent had been H living with the deceased for 23 years before the latter passes away, and there was no attempt by the deceased to revoke the trust or the transfer. Hence, the presumption must be that the gift was valid. (paras 17 & 18)

I

(4) In this case, the applicability of Islamic law is however subject to the civil law which are applicable to all irrespective of whether the parties are Muslims and non-Muslims. This must be so as they are no preserving rules of Islamic law in the applicable land law and law of trust governing the case. (para 19)

(5) The transfer was duly registered in favour of the deceased as the trustee for the respondent. Therefore, under s. 340(1) National Land Code, the deceased trustee would have indefeasible title and such indefeasibility could only be defeated by any of the specific grounds under s. 340(2) NLC. On the facts, the appellants could not bring themselves within s. 340(2). They were therefore not entitled to the declaration that the trust deed and the transfer were null and void. (para 26)

(6) The trust is valid and irrevocable. Consequently, it is enforceable against the deceased or his estate, irrespective of whether or not possession of the property was given to the respondent during the lifetime of the deceased and whether or not the property was vested in the name of the respondent during the lifetime of the deceased and whether or not the deceased received and declared the rental as his personal income. (para 27)

Bahasa Malaysia *translation of headnotes*

Simati memiliki sebidang tanah yang mempunyai sembilan rumah sewa di atasnya ('hartanah'). Pada tahun 1968, simati telah memindahmilik dan mendaftarkan hartanah kepada dirinya sebagai pemegang amanah bagi manfaat anaknya responden, yang berumur lapan tahun. Pada masa yang sama, simati juga memeterai satu surat-ikatan amanah mengisytiharkan dirinya sebagai memegang hartanah bagi pihak dan untuk amanah responden. Semasa hayatnya, simati tidak pernah mencuba untuk membatalkan memorandum pindahmilik ataupun surat-ikatan amanah berkenaan. Fakta juga menunjukkan bahawa, selepas kematian simati pada tahun 1991, responden, pada tahun 1992, telah memperoleh perintah letakhak *ex parte* dari Mahkamah Tinggi meletakhak hartanah atas namanya. Walaupun begitu, perayu, iaitu anak-anak simati dari perkahwinannya yang lain, berhujah bahawa pemberian hartanah adalah taksah di bawah undang-undang Islam sekaligus

memohon supaya hartanah dijadikan sebahagian pusaka simati. Menurut perayu, pemberian yang sah tidak dapat dilaksanakan oleh kerana hartanah, yang disewakan kepada penyewa-penyewa, tidak berada dalam milikan (fizikal) simati, sementara milikan juga tidak diberi kepada responden semasa hayat simati. Hujahan perayu ditolak oleh hakim Mahkamah Tinggi yang memutuskan bahawa satu pemberian hartanah yang sah telah dilaksanakan untuk manfaat responden. Perayu telah merayu.

Diputuskan (menolak rayuan)

Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

(1) Di bawah undang-undang Islam, seseorang boleh, semasa hayatnya, membuat pemberian harta jika syarat-syarat berikut dipatuhi, iaitu: (i) pernyataan niat donor atau pemilik harta untuk memberi; (ii) penerimaan oleh penerima, sama ada secara nyata atau tersirat; dan (iii) pengambilan milik harta oleh penerima, sama ada dengan sebenarnya atau secara konstruktif. Bagimanapun, berkaitan penyerahan milikan, terdapat pengecualain kepada syarat am tersebut, iaitu jika pemberian adalah oleh si bapa kepada anaknya yang belum cukup umur. Syarat sudah dianggap dipenuhi jika wujud niat *bona fide* untuk memberi walaupun tanpa pertukaran milikan.

(2) Simati hanya mempunyai milikan undang-undang dan kerana itu tidak boleh menyerahkan milikan fizikal kepada responden. Namun begitu, pengutipan sewa olehnya samalah seperti memiliki hartanah untuk dan bagi pihak responden/benefisiari. Selain itu, dengan memindahmilik hartanah kepada pemegang amanah untuk amanah responden, simati telah memindah milikan undang-undang kepada responden. Oleh itu, niat *bona fide* simati untuk menyerahkan hartanah sebagai satu pemberian adalah jelas dan tidak boleh dipertikaikan lagi. Apapun, responden telah menyempurnakan pemberian dengan meletakhakkan hartanah ke atas namanya.

(3) Ketiga-tiga syarat untuk satu pemberian yang sah di bawah undang-undang Islam telah pun dipenuhi. Pemberian dengan itu adalah sah di bawah undang-undang Islam dan yang arif hakim betul apabila menolak tuntutan perayu. Apapun, selepas pemeteraian amanah dan pindahmilik pada tahun 1968, responden telah tinggal bersama-sama dengan simati selama 23 tahun sebelum simati meninggal dunia, dan tiada percubaan

dibuat oleh simati untuk membatalkan pemberian. Anggapan dengan itu berbangkit bahawa pemberian adalah satu pemberian yang sah.

(4) Dalam kes ini, pemakaian undang-undang Islam bagaimanapun adalah tertakluk kepada undang-undang sivil yang terpakai kepada semua tanpa mengira sama ada pihak-pihak beragama Islam ataupun sebaliknya. Keadaan ini disebabkan tidak wujud sebarang kaedah penyelamat undang-undang Islam di dalam undang-undang tanah dan undang-undang amanah yang terpakai kepada dan mengawalselia kes di sini.

(5) Pindahmilik kepada simati sebagai pemegang amanah bagi pihak responden telah didaftar dengan teraturnya. Oleh itu, di bawah s. 340(1) Kanun Tanah Negara, simati/pemegang amanah mempunyai hakmilik tak boleh disangkal dan ketaksangkalan tersebut hanya boleh dicabar atas alasan-alasan spesifik s. 340(2) KTN. Berdasarkan fakta, perayu tidak dirangkumi oleh s. 340(2). Dengan itu, mereka tidak berhak kepada deklarasi bahawa surat-ikatan amanah dan pindahmilik adalah batal dan tak sah.

(6) Amanah adalah sah dan tak boleh dibatalkan. Ia dengan itu boleh dilaksanakan terhadap simati atau pusakanya, tanpa mengira sama ada atau tidak milikan telah diberi kepada responden semasa hayat simati, sama ada atau tidak hartanah telah diletakhak kepada responden semasa hayat simati dan sama ada atau tidak simati menerima dan mengisytiharkan sewa sebagai pendapatan peribadi beliau.

Case(s) referred to:

Ainan Mahamud v. Syed Abu Bakar Habib Yusoff & Ors [1939] 8 MLJ (FMSR) 209 ***(refd)***

Azeshabi v. Kathoonbi AIR [1966] Madras 462 ***(refd)***

Fateh Mohd v. Mitha AIR [1926] Lahore 286 ***(refd)***

In the Matter of Omar Shaik Salleh (M) and Hanisah Shaik Salleh (F), Infants; Shaik Salleh Omar Jammal v. Marriambee Shaik Omar (m.w.) [1948] 14 MLJ 186 ***(refd)***

Muhara Bibi v. Maharulla AIR [1933] Calcutta 785 ***(refd)***

Noor Jahan v. Muftkhar Dad Khan AIR [1970] All 170 ***(refd)***

Re Bahadun Hj Hassan Deed [1974] 1 MLJ 14 ***(refd)***

Re Man Mihat, Deed [1965] 2 MLJ 1 ***(refd)***

Robert v. Ummi Kalthom [1996] 1 MLJ 163 ***(refd)***

Tan Chiw Thoo v. Tee Kim Kuay [1997] 1 CLJ 541 FC ***(refd)***

Tengku Hj Jaafar ibni Almarhum Tengku Muda Ali & Anor v. Government of Pahang [1987] 2 CLJ 129; [1987] CLJ (Rep) 380 SC ***(refd)***
Wan Naimah v. Wan Mohamad Nawawi [1974] 1 MLJ 41 ***(refd)***

Legislation referred to:
National Land Code, s. 340(1), (2)

Transfer of Property Act 1883 [Ind], s. 129

Other source(s) referred to:
BR Verma's Islamic Law - Personal, 6th edn, 1991, p 554

For the appellants - Hamid Sultan Abu Backer; M/s Hamid Sultan Loga Chitra & Assoc
For the respondent - M Kanesan; M/s M Kanesan & Assoc

Reported by WA Sharif

JUDGMENT

Nik Hashim JCA:

Background

[1] The main agreed question in this appeal is whether the trust deed and the transfer both dated 2 February 1968 of a piece of land described as Lot 465, Sek. 11 – W Daerah Timur Laut, Georgetown, Pulau Pinang on which nine houses were erected (the property) by the deceased father to his son (the respondent) was null and void under Islamic law since possession of the property was never given to the respondent during the lifetime of the deceased father and the property was never vested in the name of the respondent during the lifetime of the deceased.

[2] On 24 May 2005 we ruled that the trust deed and the transfer of the property were valid and hence we dismissed the appeal with costs and ordered that the deposit be paid to the respondent to account of his taxed costs.

[3] The facts of the case were that the appellants and the respondent were the children of the deceased father by his marriage to the first and second wives respectively.

[4] On or about 2 February 1968, the deceased transferred the property to himself as trustee for the benefit of the respondent who was then only eight years old. The memorandum of transfer was registered at the Pulau Pinang Land Registry. Simultaneously the deceased on the same day (ie, 2 February 1968) executed a trust deed declaring himself to be trustee holding the property in trust for the respondent and agreeing to transfer the property to any such person as the respondent might at any time direct.

[5] Physical possession of the property was never given to the respondent during the lifetime of the deceased since the property has been occupied by tenants. Neither the property was vested in the name of the respondent during the lifetime of the deceased.

[6] The deceased had on 20 August 1988 amended his name in the title of the property from 'Mohamed Mydin Merican bin Meera Hussain @ T.M. Mohamed Mydin bin Meera Hussain' to T.M. Mohamed Mydin (K/p. 1837149).

[7] On 12 May 1991, the deceased passed away. At that time, the respondent was about 30 years old.

[8] On or about 5 October 1992, the respondent obtained an *ex parte* vesting order from the High Court Pulau Pinang vesting the property in his own name. The order was duly registered with the Land Registry Pulau Pinang whereby the property was vested in favour of the respondent.

[9] Before us, the appellants argued that the purported gift of the property was null and void under Islamic law because the property was not then nor at any time thereafter in the possession of the deceased as the property was rented out, and neither was the possession of the property ever handed to the respondent during the lifetime of the deceased nor was it legally vested in the name of the respondent during the deceased's lifetime even though the deceased had the opportunity to do so when the deceased went to the land registry to amend his name in the title of the property. Besides, the deceased was receiving the rental income during his lifetime, thus demonstrating that the deceased had no actual intention to gift the property to the respondent and cited several authorities in support. The appellants concluded by saying that since the gift was void the property becomes part of the estate of the deceased and all the deceased's beneficiaries are entitled to a share in the estate as set out in the Holy Quran, Ahadis and Sunnah of the Holy Prophet.

[10] With respect we do not agree with the appellants. We agree with the learned trial judge that there was a valid transfer of the gift of the property to the respondent. In arriving at our decision, we have considered the submissions of both the parties.

Islamic Law

[11] Under Islamic law a man may lawfully make a gift of his property during his lifetime provided the following three conditions are fulfilled:

(i) a manifestation of the wish of the donor to give;

(ii) the acceptance of the donee either impliedly or expressly; and

(iii) the taking possession of the subject matter of the gift by the donee, either actually or constructively.

(see *Tengku Haji Jaafar ibni Almarhum Tengku Muda Ali & Anor v. Government of Pahang* [1987] 2 CLJ 129; [1987] CLJ (Rep) 380; *Robert alias Kamarulzaman v. Ummi Kalthom* [1996] 1 MLJ 163; and *B.R. Verma's Islamic Law - Personal* 6th edn. 1991 p. 554).

[12] It has been decided in the case law that in applying the rules of the Islamic law relating to gifts the rigour of unmeaning technicalities should not be enforced, divorced from the realities of the particular situation in individual cases, and that the courts should avoid an impractical approach to the question (see *Azeshabi v. Kathoonbi* AIR [1966] Madras 462).

[13] Under Islamic law delivery of possession of the property by the donor is an essential element to constitute a complete gift. However, the exception to this general rule where the gift is from a father to his minor son in which case delivery of possession is not necessary at all. The law will be satisfied without change of possession and will presume subsequent holding of the property to be on behalf of the minor. All that would be necessary if at all is a *bona fide* intention to give (see *B.R. Verma's Islamic Law - Personal,* 6th edn. 1991 p. 583).

[14] In *Fateh Mohd v. Mitha* AIR [1926] Lahore 286 the father executed a deed of gift of land in favour of the minor son. Before registration of the deed of gift, the father sold the land to a third party and the sale was registered. When the deed of gift was presented for registration, it was objected by the father. It was

held in that case that under Islamic law, a deed of gift executed by father to his minor son is complete and binding as soon as the donor executes the deed, and neither registration nor delivery of possession is necessary to make it complete. This exception to the general rule for possession has been acknowledged by the court in *Noor Jahan v. Muftkhar Dad Khan* AIR [1970] All 170 at p. 176. Similarly here, the exception applies to the present case. The gift was complete even without the transfer of possession.

[15] In the case before us, there is no dispute that the property was a rent controlled property and was tenanted since the deceased purchased the property. Thus, there was no physical possession of the property by the deceased but only legal possession. The possession of the property could only be symbolic since the property was tenanted, (see *Noor Jahan* at p. 178). Hence physical delivery of possession could not be given to the respondent. The collection of rental by the deceased trustee would be equivalent to possession of the property by the deceased trustee on behalf of the respondent beneficiary. However, the deceased had effected a legal transfer of the property in favour of the trustee on trust for the respondent and thereby transferred the legal possession of the property to the respondent. This was the only means for effecting transfer under our National Land Code (the NLC). Hence, the deceased had done everything possible within his means to deliver legal possession as the gifted property is susceptible of. Thus, the deceased's *bona fide* intention to give the property as a gift to the respondent is manifestly clear and unequivocal.

[16] In our case, there is no dispute that the respondent had subsequently vested the property in his name. Hence, the gift had been perfected. In *Muhara Bibi v. Maharulla* AIR [1933] Calcutta 785 it was held that though a gift may be invalid for want of delivery of possession, it may be validated by obtaining possession subsequent to the gift.

[17] It is also no disputed that the trust was created and the transfer was executed on the same date 2 February 1968 and the respondent lived with the deceased father until the latter passed away in 1991 and for the period of 23 years since the creation of trust the deceased did not attempt to revoke the trust or the transfer effected in favour of the respondent. So, the presumption is that the gift was valid (see *Azeshabi (supra)* at p. 463).

[18] In this case, the three conditions for a valid gift under the Islamic law had been fully satisfied. It is therefore our firm view that the gift was validly made even under the Islamic law and the learned judge was right in dismissing the appellants' claim.

Civil Law

[19] However, in the instant case, the applicability of Islamic law is subject to the civil law which are applicable to all irrespective of whether the parties are Muslims and non-Muslims. And here there are no preserving rules of Islamic law in the applicable land law and the law of trust that govern this case.

[20] Thus, in *Ainan bin Mahamud v. Syed Abu Bakar bin Habib Yusoff & Others* [1939] 8 MLJ (FMSR) 209 it was held that the Evidence Enactment is a statute of general application and all the inhabitants of the Federated Malay States are subject to its provisions whatever may be their race or religion. In questions of legitimacy in the case of Muslims s. 112 of the Evidence Enactment applies to the exclusion of the rule of Islamic law.

[21] *In the Matter of Omar bin Shaik Salleh (M) and Hanisah binte Shaik Salleh (F), Infants; Shaik Salleh bin Omar Jammal v. Marriambee binte Shaik Omar (m.w.)* [1948] 14 MLJ 186, it was held that in this case there is legislation in general terms regulating the matter (guardianship), making no exception in the case of Muslims and therefore the Ordinance, in this case the Guardianship of Infants Ordinance (Cap 50), must be taken to supersede whatever law might have been applicable previously.

[22] Further, in *Tengku Haji Jaafar Ibni Almarhum Tengku Muda Ali & Anor v. Government of Pahang* [1987] 2 CLJ 129; [1987] CLJ (Rep) 380, the Supreme Court recognized the following laws affecting land generally in the State of Pahang before 1889: (i) General Land Regulations 1889; (ii) Land Enactment 1897; (iii) The Land Enactment 1903; and (iv) The Land Enactment 1911; and these laws were applicable in the State of Pahang after the signing of the Treaty of Pahang on 8 October 1887. But because the gift of the subject land by the former Sultan of Pahang to the appellants was effected in 1887 ie, two years before the first Land Regulations 1889 was enacted, the Supreme Court applied Islamic law as the land law applicable to the gift in Pahang then was Islamic law and not because the parties were Muslims. If there had been a registered transfer under any Enactment, Ordinance or Regulation then the Supreme Court would not have applied

Islamic law but the relevant Enactment, Ordinance or Regulation as were applicable then. Indeed in the same case, the Supreme Court upheld the application of the law of limitation which is governed by the Limitation Act 1953.

[23] In *Wan Naimah v. Wan Mohamad Nawawi* [1974] 1 MLJ 41 which involved Muslim family, the Federal Court applied trust law and not Islamic law to enforce a gift by an oral declaration of trust. And it must be noted that the plaintiff in this case never had possession of the property and the court applied trust law to dispose of the matter in the plaintiff's favour.

[24] In *Re Man bin Mihat, Deed* [1965] 2 MLJ 1 also involving Muslim family, the court applied trust law and not Islamic law to determine the issue. Suffian J (as he then was) at p. 3 said:

> Indeed it is quite common for a Muslim to buy land for his minor children and have himself in the Land Office records as trustee ...
>
> During his lifetime the land is trust property and his death does not alter its character ... So long as any object of the trust remains unperformed the trust cannot be defeated and may be enforced by the widow (beneficiary).

The principle in *Re Man* was followed by Abdul Hamid J (as he then was) in *Re Bahadun bin Haji Hassan Deed* [1974] 1 MLJ 14 with regard to proceeds from insurance policy.

[25] It is worthy of note that in India the courts strictly applied Islamic law not merely because the parties are Muslims but because s. 129 of the Indian Transfer of Property Act 1883 expressly preserves the rule of Islamic law as regards gifts. However, in Malaysia, we do not have any such preservation or saving provisions of Islamic law in the NLC, and therefore the law applicable to our case is civil law in particular the land law, and the law of trust, and that they should be applied to all parties regardless of whether they are Muslims or non-Muslims. Hence, the Indian cases cited by the appellants are to be viewed in the context of the Indian law, and therefore not applicable here.

[26] In the present case, the transfer is duly registered in favour of the deceased as the trustee for the respondent. Therefore under s. 340(1) of the NLC the deceased trustee would have indefeasible title and such indefeasibility could only be defeated by

any of the specified grounds under s. 340(2) thereof (see *Tan Chiw Thoo v. Tee Kim Kuay* [1997] 1 CLJ 541). However, as rightly pointed by the learned judge, the appellants have not brought themselves within s. 340(2) of the NLC, and therefore, the appellants are not entitled to the declaration that the trust deed and the transfer were null and void.

[27] For the reasons given, we are of the view that there was a clean and clear transfer of the property to the trustee and a written trust deed executed by the deceased which had been duly registered with the land registry. The intention of the deceased to give the property as a gift to the respondent is very clear by the express terms of the trust deed. In fact the registration of the legal transfer is the only way the property could be transferred to the trustee under the NLC which the deceased had done in this case. The deceased did not reserve any express power of revocation in the trust deed. Further, there was no objection from the appellants during the deceased's lifetime over the creation of trust in favour of the respondent. We therefore agree with the respondent that the trust is valid and irrevocable. It is a completely constituted trust and thus enforceable against the deceased or his estate, irrespective of whether or not possession of the property was given to the respondent during the lifetime of the deceased and whether or not the property was vested in the name of the respondent during the lifetime of the deceased and whether or not the deceased received and declared the rental as his personal income. Thus, the learned judge was right in deciding the case in the respondent's favour.

[28] My learned brother Richard Malanjum, FCJ has seen this judgment in draft and has expressed his agreement with it.

However, my learned brother Abdul Kadir bin Sulaiman, FCJ has since retired and has no opportunity to see the judgment in draft.